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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Implementation of Sections 11 and 13
of the Cable Television Consumer
Protection and Competition Act of 1992

Anti-trafficking Provisions and Cross-
Ownership Limitations

MM Docket No. 92-264

REPLY COMMENTS OF

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SUMMARY

The Commission alone should interpret and enforce the three year holding requirement.

- Only the Commission can ensure a consistent and reasonable anti-trafficking policy.
- If local or state authorities are given any enforcement role, many will apply the holding requirement excessively, unpredictably and inappropriately to expand their leverage regarding cable system sales and transfers.
- Existing Commission policies, regulations and procedures provide adequate means for the Commission to enforce the three year holding requirement.
- Operators should be able to proceed in good faith without prior certification.

The Commission should apply the three year holding requirement to a limited scope of transactions in order to avoid unduly inhibiting legitimate business activity and impairing access to investment capital.

- The Commission's Broadcast rules provide policies and precedent that can identify when an operator's transfer of system ownership involves a substantial change that results in a new owner having actual working control.
- The Commission should adopt a simple "bright line" test - service to the first subscriber - as the definition for when initial construction occurs.
- The Commission should adopt a materiality threshold - a majority of subscribers receive service from systems held at least three years - to determine compliance for multiple system transfers.
- The Commission should establish the broad scope of the statutory exceptions through general policies without specifically identifying legal, procedural or other contractual elements.

- The Commission has general waiver authority, which it should apply flexibly on a case-by-case-basis. Waivers granted prior but subject to receipt of any required local or state approval are beneficial.

The Commission must take authoritative action to ensure that the purpose of Section 617(e) is realized.

- Many state and local authorities will abuse their discretion in order to impede the 120 day limitation on their power to disapprove a transfer.
- The Commission should adopt a mandatory application form for local or state approvals that will preemptively establish uniform information requirements regarding the qualifications of the transferee or assignee. Once that application and any additional information specifically identified in and required by the franchise agreement are filed, the 120 days will start and cannot be interrupted by the franchising authority.

The Commission's present cable/MMDS cross-ownership regulations effectively implement the 1992 Cable Act's prohibitions.

- Existing Commission waiver and exception standards for cable/MMDS cross-ownership should be retained, and extended to cable/SMATV cross-ownership.

The Commission should apply the cable/SMATV cross-ownership prohibition narrowly, consistent with the statutory language and Congressional intent.

- A cable operator should be given at least six months to integrate an acquired SMATV system into its cable system to whatever extent, if any, is necessary.
- The prohibition applies equally to SMATV operators and cable operators, including so-called SMATV systems that legally are cable systems because they use public rights-of-way.

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INTRODUCTION

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, herein replies to certain comments filed with the Federal Communications Commission (the "Commission") in response to Sections III and IV (relating to sales of cable systems, and cross-ownership between cable systems and MMDS or SMATV systems, respectively) of the Commission's Notice of Proposed Rulemaking in MM Docket No. 92-264 ("Notice").¹ Time Warner presently intends to submit separate comments on or before May 12, 1993, in response to Sections V, VI and VII of the Notice (relating to vertical and horizontal ownership limits, including subscriber limits, channel occupancy limits and participation in program production).

Time Warner is the plaintiff in a lawsuit pending in Federal District Court in Washington, D.C., in which it takes the position, inter alia, that Section 11 and other provisions of the Cable Television Consumer Protection and Competition Act of 1992² violate its rights under the First Amendment to the United States Constitution.³ Time Warner submits these reply comments without prejudice to its claims and arguments in that lawsuit.

¹Notice of Proposed Rulemaking and Notice of Inquiry (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions), MM Docket No. 92-264, FCC 92-542, ___ FCC Rcd. ___ (released December 28, 1992).

²Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

³See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C., filed November 5, 1992).

I. ANTI-TRAFFICKING PROVISIONS: The three year holding requirement in sections 617(a) through (d).

A. The comments reflect the urgent need for sole and absolute Commission jurisdiction and authority.

The Commission needs to assume full authority over and responsibility for Section 617⁴ in order to ensure efficient and uniform enforcement of Section 617 and to avoid unintended and unproductive effects that local enforcement will likely produce.⁵

⁴Section 13 of the 1992 Cable Act adds a new Section 617 to the Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq. ("Communications Act of 1934"). (Hereinafter, "Section ____" references are to sections of the Communications Act of 1934, including any 1992 Cable Act amendments. For example, "Section 617" hereinafter refers to 47 U.S.C. §537(a), which is Section 617 of the Communications Act of 1934 and §13 of the 1992 Cable Act.) Section 617(a) prohibits an operator's sale or transfer of ownership in a cable system within three years following acquisition or initial construction, subject to certain exceptions pursuant to Sections 617(b) and (c), and waiver authority vested in the Commission pursuant to Section 617(d). Section 617(e) limits to 120 days the duration of a franchising authority's power to disapprove franchise transfer requests.

⁵The Commission has recognized the need "to ensure consistency in the interpretation of the [anti-trafficking] rule..." Notice at ¶ 13. See also, Comments of Time Warner Entertainment Company, L.P. ("Time Warner Comments") at 37-40; Comments of Liberty Media Corporation ("Liberty Media Comments") at 49; Comments of Tele-Communications, Inc. ("TCI Comments") at 44; Joint Comments of Cablevision Industries Corporation and Comcast Corporation ("Cablevision Industries/Comcast Comments") at 25; Comments by Cole, Raywid & Braverman on behalf of a Group of Certain Operators and State and Regional Associations ("Industry Group Comments") at 18-20; and Comments of Cablevision Systems Corporation ("Cablevision Systems Comments") at 18-20. However, uniformity must be subject to the distinct purpose and intent of Congress in specific statutory requirements. Any move by the Commission in this rulemaking, as recommended in the Comments of Bell South Telecommunications, Inc. ("Bell South Comments"), to establish uniform attribution standards for all communications providers within the Commission's jurisdiction that would be determinative for any and all ownership

(continued...)

The Commission need only review the comments of or on behalf of several local and state regulatory bodies to recognize that many franchising authorities will seek to expand their power through an independent role, not subject to oversight by the Commission, in interpreting or enforcing Section 617 (both the three year holding requirement and the 120 day limitation on any franchise authority's discretion to disapprove a franchise transfer).⁶

Many local authorities would abuse such autonomy to expand their leverage against system operators beyond the extensive rights expressly granted to them by the 1992 Cable Act and to unilaterally interpret the requirements of mutually negotiated franchise agreements. Even certain state and local regulators that desire a significant role in enforcing the three year holding requirement recognize the need for the Commission to provide guidance and to have ultimate authority regarding Section 617.⁷

⁵(...continued)
restrictions is likely to increase the number of unproductive disputes involving communications service providers, other regulators and Congress.

⁶See, e.g., Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors and the National Association of Counties ("Local Governments Comments") at 5-6, 8, 10-11, 14-16 (essentially contemplates complete local autonomy for jurisdiction, scope and enforcement of Section 617, subject only to local court review, with the Commission providing only minimal guidance).

⁷See, e.g., Comments of New York State Commission on Cable Television ("NY Commission Comments") at ¶ 3 (provisions of franchise agreements vary substantially), and ¶¶ 5 and 13 (seeks
(continued...))

Contrary to the suggestion of some municipal authorities, the Commission's role under Section 617 is not limited to merely coordinating local enforcement.⁸ There are only two references to franchising authorities in Section 617. Section 617(c)(2) recognizes that a franchising authority may have, although this provision does not create, the power to compel a transfer. Section 617(e) limits the duration of time within which franchising authorities may disapprove a franchise transfer that requires their prior approval. Otherwise, Section 617 does not expand or restrict the current rights that any local or state authority may have under any applicable franchise agreement or state or local law concerning approval of transfers or sales.⁹

⁷(...continued)
Commission guidelines; does not object to Commission oversight of local decisions; and notes benefits of Commission's expertise, expeditious and cost-efficient judgments, uniformity in application, and waiver authority); Comments of New Jersey Board of Regulatory Commissioners ("NJ Board Comments") at 2-4 (contemplates specific guidance from the Commission regarding the scope of the holding requirement, waiver policies and information necessary to determine availability of exceptions); and Comments of William J. Catto on behalf of the Cities of Inverness, Crystal River and Dunnellon, and the Town of McIntosh, Florida ("Catto Comments") and Comments of the County Attorney of Citrus County, Florida ("Citrus County Comments") (both request Commission state that Section 617(a) applies to certain types of transactions). Even the Local Governments Comments seek Commission confirmation of their aggressive claims to authority.

⁸See, e.g., Local Governments Comments at 5-6.

⁹See, House Committee on Energy and Commerce, H.R. No. 628, 102d Cong., 2d Sess. (1991) ("1991 House Report") at 120; and House Committee on Energy and Commerce, H.R. Rep. No. 682, 101st Cong., 2d Sess. (1990) ("1990 House Report") at 117-118.

Any suggestion that Congress intended, or that it is more appropriate, for local franchising authorities to have jurisdiction over or responsibility for the implementation, interpretation and enforcement of Section 617 because of other provisions of the 1992 Cable Act including its amendment to Section 613(d) is an unreasonable and unsupportable interpretation.¹⁰ In particular, Section 613(d), as amended by the 1992 Cable Act, pertains to various ownership and other restrictions that Congress perceived as potentially reducing competition. The extent to which Section 613(d) may affect the power of state or local authorities is irrelevant to determining the proper jurisdiction for enforcing Section 617.

B. The Commission can and should establish a clear and limited scope of transactions subject to the holding requirement.

Anti-trafficking rules in the form of holding period requirements, even if applied rigidly as recommended by certain regulatory interest groups, do not ensure the absence of "profiteering" transactions.¹¹ A holding period requirement does

¹⁰See, e.g., Catto Comments at 1; and Local Governments Comments at 6.

¹¹See, e.g., Local Governments Comments at 3 (broad construction sought to "ensure that cable operators adhere strictly to the [three year holding requirement].") and 4 (the anti-trafficking rules are an "integral and important part of the consumer protection scheme... in the 1992 [Cable] Act."); NJ Board Comments at 2 (most inclusive application of three year holding requirement is necessary to implement Congress' intent to prevent profiteering and other transfers that "could" affect rates or services); Citrus County Comments at 1-2 (ability to deny transfer is imperative because 1992 Cable Act rate
(continued...))

not,¹² while other regulatory provisions of the 1992 Cable Act can and do, directly address these alleged abuses.¹³ System prices, whether from a seller's or a buyer's perspective, will no

¹¹(...continued)
regulation provisions is a "hollow remedy" for subscribers; and Catto Comments at 2 ("transfer" for purposes of three year holding requirement should encompass any change in ownership which would or could cause an "involuntary change in cable companies for any subscriber").

¹²The Commission has previously concluded that holding requirements do not directly address trafficking concerns. See Transfer of Broadcast Facilities, Report and Order, 52 RR 2d 1081 (1982). See Time Warner Comments at n.7 and n.8, and related text at 3-4; TCI Comments, Attached Paper entitled An Economic Analysis of the [Commission's] Proposed Cable Ownership Restrictions ("Economic Consultant's Report") at 49-52; Industry Group Comments at 2 (there is little or no correlation between system sales and higher rates); and Liberty Media Comments at 39 (Commission's considerations in Transfer of Broadcast Facilities support narrow interpretation of three year holding requirement for cable systems).

¹³See, e.g., Time Warner Comments at 4; Liberty Media Comments at 40-41 (broad and inflexible application of three year holding requirement is not necessary to protect against alleged evils because other regulatory provisions in 1992 Cable Act will protect against adverse affects on rates and services, citing Transfer of Broadcast Facilities); TCI Comments at 41 (rate regulation mitigates against profiteering, so liberal interpretation of three year holding requirement is appropriate); Comments of Coalition of Small System Operators ("Small Systems Group Comments") at 3 (flexibility in application of three year holding requirement poses little risk of rate hikes for small systems because their marginal profits and substantial debt make them undesirable targets for speculators); Comments of Sandler Capital Management ("Sandler Comments") at 1-2 (the pervasive regulation imposed by 1992 Cable Act could create disincentive to investment in cable industry, so implementation of three year holding requirement and other regulation must be balanced to maintain stability, allow growth and avoid loss of capital sources) (these points are reiterated in the Comments of Corporate Partners ("Corporate Partners Comments") and Cablevision Industries/Comcast Comments, which, together with Sandler Comments, are hereinafter referred to as "Sandler, et al"); and Comments of National Cable Television Association, Inc. ("NCTA Comments") at 39.

longer be able to reflect any expectations that are inconsistent with the 1992 Cable Act's specific provisions regulating rates and services. Indeed, rigid enforcement of even legitimate restrictions on transferability can foster higher rates and poorer service by promoting or prolonging economic inefficiencies to the detriment of investors, system owners and operators, and subscribers. These conclusions are both an economic reality and a legal necessity, irrespective of whether "profiteering" and "trafficking" are defined narrowly (i.e., purchasing systems with no real intent to operate them but a clear intent to quickly resell them for a fast profit)¹⁴ or broadly (i.e., to include also any sale to a purchaser with expectations of improved margins through rate increases, service decreases, cost cuts that adversely affect service, programming reductions or other changes not balanced with benefits to subscribers).¹⁵

Restrictions on transferability distort and discourage business activity.¹⁶ But Congress would have no reason to block transactions that may facilitate efficient operations, improved

¹⁴See, e.g., TCI Comments at 41; and NCTA Comments at 39.

¹⁵See n.11, supra; Local Governments Comments at 2 (trafficking results in higher rates with no significant increase in service due to significant debt incurred by purchaser); TCI Comments, Economic Consultant's Report at 50 (system prices reflect buyers' expectations regarding future rates); and Sandler, et al, at 11 (profiteering entails adverse effects on rates and service).

¹⁶See Time Warner Comments at 4.

service or expanded programming options.¹⁷ Neither would Congress have any reason to impair unnecessarily the cable industry's access to investment capital.¹⁸ A narrow application of the three year holding requirement will sufficiently address Congress' concerns, given the pervasive regulation provided by the 1992 Cable Act.¹⁹

Many local and state regulators would impose a rigid application of the three year holding requirement to an incredibly broad scope of inappropriate transactions. The Commission should expressly reject such rigid, excessive theories and procedures, such as the following proposals of some commenters:

- (1) In any transaction involving more than a 5% ownership interest, the operator must prove the transaction does not effect working control.²⁰
- (2) Every system - presumably defined to mean each franchise agreement without regard to a system's

¹⁷See, e.g., NCTA Comments at 39; TCI Comments at 43; Comments of Viacom International, Inc. ("Viacom Comments") at 21; Small Systems Group Comments at 4-5; and Comments of Al Szablak (operator of small system who describes benefits to subscribers if his system were sold to owner of larger nearby system, but sale discussions were derailed when the 1992 Cable Act was enacted because purchaser fears such purchase will restrain subsequent sale of combined operations to a large MSO).

¹⁸See, e.g., Liberty Media Comments at 41 (even time required to act on a waiver request may deter financing); TCI Comments at 42-43; Sandler Comments and Corporate Partners Comments, generally (each reflect their investor/financing interest in the industry); Cablevision Industries/Comcast Comments at 4-6; and NCTA Comments at 39.

¹⁹See Time Warner Comments at 4.

²⁰See Local Governments Comments at 10-11.

operational structure - must separately meet the three year holding requirement, or the group cannot be transferred as a group.²¹

- (3) The holding requirement must apply to any transfer that "could" affect rates or service.²²
- (4) Any transfer of a 20% to 25% ownership interest should be subject to the holding requirement, regardless of whether that interest entitles its owner to actual working control of the system.²³
- (5) Municipally owned systems are completely exempt.²⁴

Commenters for several Florida authorities have also confused the issues raised by the Notice regarding the scope of the three year holding requirement.²⁵ Disagreements about whether a transaction involving part or all of a system, its assets or its service area (whether or not a franchise agreement is included in such assets) to require approval under any franchise agreement or applicable state or local law must be resolved as other disputes thereunder would be resolved. That determination, however, is irrelevant to whether the transaction

²¹Id. at 12-13.

²²See NJ Board Comments at 2.

²³See NY Commission Comments at ¶ 6.

²⁴See Local Governments Comments at 13. In contrast, Time Warner Comments at 25-16 and Industry Group Comments at 16 stated that municipally owned systems are not exempt. The fact that Section 7 of the 1992 Cable Act permits local governments to operate systems without a "franchise agreement" is not relevant to or dispositive of whether their systems (whether or not franchised) are subject to the Section 617 holding requirement for "systems."

²⁵See Catto Comments; and Citrus County Comments.

triggers any issue about the three year holding requirement.²⁶ Neither local or state authorities nor the Commission has any authority or basis to use the three year holding requirement in Section 617 to expand the rights of local or state authorities under franchise agreements or applicable state or local laws.²⁷

These rigid, inappropriate and inconsistent theories also raise the issue of retroactive or prospective application. Time Warner was joined by another operator in an appeal for the Commission to apply the three year holding requirement prospectively, only, to systems acquired after the 1992 Cable Act was enacted.²⁸ At the very least, the request by Time Warner and NCTA for the Commission to expressly grandfather any transaction or contractual arrangement involving ownership of a system that was pending when the 1992 Cable Act was enacted should be granted as a matter of fundamental fairness.²⁹

²⁶Sections 617(a) through (d), on their face, pertain to "systems" not franchise agreements or other governmental authorizations to provide cable service. See also Time Warner Comments at 12-13.

²⁷See 1991 House Report at 120; 1990 House Report at 117-118. See also Time Warner Comments at 37-38.

²⁸See Time Warner Comments at 4-5; and Liberty Media Comments at 42.

²⁹See Time Warner Comments at 6-7; and NCTA Comments at 54-55.

C. Existing Commission procedures can adequately provide for enforcement without prior local or federal certification.

Section 617, like many federal law requirements that affect the ownership and operation of cable systems, is not an appropriate or necessary subject for prior local or federal regulatory certification and related administrative proceedings.³⁰ Disputes or objections from franchising authorities can be brought to the Commission's attention for expeditious resolution under Section 76.7 of its Rules.³¹

As with other laws and regulations, system operators should be allowed to proceed in good faith without any administrative certification process, or any fear of draconian consequences for good faith transgressions.³² Cable system operators consistently address many legal requirements when making business decisions.

³⁰See, e.g., Time Warner Comments at n.42 and at 40-41; TCI Comments at 44 (any local certification should be procedural, with disputes brought to Commission); Industry Group Comments at 20 (no need for pre-closing certification but could include in post-closing notice under Commission Rule §76.12) and 28 (documentary support for an exception claimed should not be required; cable operators do not certify compliance with other federal laws and Commission rules); and NCTA Comments at 54 (no certification needed, but if required should be to Commission).

³¹See, e.g., Time Warner Comments at 39; Liberty Media Comments at 48-49 (endorses use of §76.7 of Commission's Rules); TCI Comments at 46 (Commission should have expedited declaratory ruling and complaint procedures) and 49 (waiver requests could be processed pursuant to §76.7); Cablevision Industries/Comcast Comments at 25 (Commission should use its §76.7 Rules, through expedited paper pleadings); Industry Group Comments at 28 (operators response should be simple, subject to Commission's ability to request additional information).

³²See, e.g., Time Warner comments at 40; and TCI Comments at 46.

They turn to professional experts for legal and financial advice, and act in good faith in reliance on such advice. Section 503 forfeiture provisions can be used by the Commission, but should only be used to address egregious violations.³³ Time Warner endorses the recommendation that the Commission grant retroactive waivers for good faith violations in order to assure good title and avoid adverse affects on access to financing.³⁴

D. The Commission should clearly and simply define when initial construction occurs.

The comments evidence the need for the Commission to provide definiteness in measuring the three year holding period. Expressly called for by many commenters, the need for fairness and certainty provided by a definite measuring stick is further evidenced by the uncertain and inconsistent standards suggested by most of the regulatory commenters.³⁵

The most consistent measure recommended for new systems relates to initiation of service that requires the existence of a

³³Id.; see also, Cablevision Industries/Comcast Comments at 26-27; Industry Group Comments at 28-29; and NCTA Comments at 54.

³⁴See Industry Group Comments at 29.

³⁵See Local Governments Comments at 9 (initial construction is when service offered and available throughout franchise area); NJ Board Comments at 3 (initial construction is system activation); and NY Commission Comments at ¶ 3 (franchise terms vary substantially) and ¶ 10 (initial construction is date commence construction; if franchise agreement provides construction schedule, then operator must show that subsequent to commencement, construction proceeded as required). See also n.11, supra.

headend and some amount of cable to at least one subscriber.³⁶ The frequent references to technical concepts and franchise agreement requirements regarding system construction, service initiation and system expansion reinforce the need for the Commission to identify a definite starting point that can be clearly and consistently determined. Initiation of service by a system to its first subscriber provides a "black line" test that is consistent with the anti-profiteering purpose of the holding requirement.

E. The Commission's Broadcast Rules can identify substantial changes in cable system ownership that involve actual working control.

The Commission's Rules and policies relating to substantial changes in ownership or control of broadcast licensees under Sections 309(c)(2)(B) and 310(d) can be extremely useful in the implementation of the three year holding requirement for cable systems.³⁷ Although it is appropriate to recognize the broader

³⁶See, e.g., Time Warner Comments at 10-11; TCI Comments at 49 (service to first subscriber or date franchise issued); Small Systems Group Comments at 6 (activation of first headend); Cablevision Industries/Comcast Comments at 27 (franchise award date); Industry Group Comments at 6-7 (when activated for CLI testing; filing of Form 320 with Commission); and NCTA Comments at 43 (first customer served).

³⁷See, e.g., Time Warner Comments at 7-10; NY Commission Comments at ¶¶ 6 and 8; Liberty Media Comments at 38; Sandler, et al, at 4, 7 and 10; Comments of Intermedia Partners ("Intermedia Comments") at 2 and 4; Industry Group Comments at 4; and NCTA Comments at 40-43.

purposes of the broadcast Rules,³⁸ there is no reason to avoid their benefit in implementing anti-trafficking provisions for the cable industry.

Given Section 617(a)'s literal application to an operator's system ownership and its limited purpose of preventing profiteering, the Commission's Rules for broadcasters should be used to determine whether a cable system transfer involves a substantial change of ownership in the system that entitles the new owner to actual working control of the system. Virtually every commenter, in and out of the industry, seems to recognize that any abuses from trafficking and profiteering can only arise when a new person acquires actual working control of, not just an attributable interest in, a system.³⁹ The definition of "cable operator" in Section 602(5) may also be useful, but the Commission must acknowledge that its broader scope reflects a broader purpose than Sections 617(a) through (d), which specifically pertain to an operator's transfer of ownership in a cable system.⁴⁰

³⁸See, e.g., Liberty Media Comments at 38; TCI Comments at 47; Intermedia Comments at 2, 4; and Cablevision Systems Comments at 18.

³⁹See, e.g., Local Governments Comments at 10-11; NJ Board Comments at 2; NY Commission Comments at ¶ 6; Time Warner Comments at 7-10; Liberty Media Comments at 43-44; TCI Comments at 47; Sandler, et al, at 4-10; Intermedia Comments at 2-4; Industry Group Comments at 3-4; Cablevision Systems Comments at 18; NCTA at 40-43.

⁴⁰See, e.g., Liberty Media Comments at 43; TCI Comments at 47; and Industry Group Comments at 3.

F. Materiality standards for MSOs and group transfers are appropriate and should be based on system subscribers.

Uniform national standards for MSO or system group transfers must be established by the Commission. This need, which reflects the overwhelming realities of the industry from an operational and financial perspective, was recognized by commenting operators, programming providers, investors and a major state regulator.⁴¹ A materiality threshold will address Congress' concerns by ensuring substantial compliance with the holding requirement without unduly inhibiting legitimate transactions and causing market inefficiencies.

A majority of subscribers is the best threshold for transfers involving groups of systems.⁴² Buyers of systems pay prices, often phrased as a price per subscriber or a multiple of cash flow, that reflect the buyer's expectations about the investment potential of the acquisition. A majority of subscribers test is, indeed, analogous to the Commission's policy

⁴¹See, e.g., NY Commission Comments at ¶ 12; Time Warner Comments at 13-18; Liberty Media Comments at 47; TCI Comments at 50; Viacom Comments at 21; Small Systems Group Comments at 7; Sandler, et al, at 20; Intermedia Comments at 7; Industry Group Comments at 7-8; and NCTA Comments at 44-45. See also Notice at ¶ 14 (1992 Cable Act not meant to forestall MSO transfers).

⁴²See, e.g., Time Warner Comments at 15-16 (majority of subscribers are in systems held three years); TCI Comments at 50 (percentage of subscribers); Viacom Comments at 22 (50% of homes passed); Sandler, et al, at 20 (look to system held longest); Intermedia Comments at 7 (regional clusters measured by majority of subscribers); Industry Group Comments at 7-8 (50% of subscribers, not of franchises or communities); and NCTA Comments at 45 (majority of subscribers are in systems held three years).

that a single majority owner of a broadcast licensee negates any other ownership interest from being deemed cognizable.⁴³

G. The Commission should establish the broad scope of the statutory exceptions.

The comments also make clear that the Commission's guidance and ultimate authority is required regarding the statutory exceptions to the three year holding requirement. Numerous parties agreed with Time Warner that the exceptions in Sections 617(b) and (c) were intended to be applied broadly.⁴⁴

The "affiliate" exception in Section §617(c)(1) must not be interpreted to include standards not expressed in the statute. There is no reasonable basis for distinguishing pro forma or affiliate transfers because of the reason for the restructuring or reorganization, such as refinancing arrangements.⁴⁵ Nor is there any reasonable basis for the Section 617(b) exception for transactions subsequent to an initial sale or the Section

⁴³See Industry Group Comments at 7.

⁴⁴See, e.g., Time Warner Comments at 20-28; TCI Comments at 52; Industry Group Comments at 9-17; and NCTA Comments at 46-49.

⁴⁵See, e.g., NY Commission Comments at ¶ 8 (seeks to exclude from affiliate exception any steps taken that change security arrangements, or that increase debt or debt service, even if there is no change in actual control); Cablevision Systems Comments at 15-17 (exception should cover sales of substantial ownership percentage to or from a financing source such as limited partner(s) if same operator retains day-to-day responsibility); and Sandler, et al, at 15-16 (conversion of convertible securities to common equity is beneficial and should be permitted even if involves substantial change in ownership) and 23 (resales after foreclosure should be exempt under Section 617(c)(2)).

617(c)(2) exemption for transactions required by law to be limited to specific laws or specific requirements identified in advance in specific agreements.⁴⁶ Finally, any movement of assets within commonly controlled organizations, including movement that reasonably can be considered a multiple step transaction or that may be principally motivated by legal restrictions, should not initiate a new holding period.⁴⁷

The scope of the Section 617(c)(3) exception for tax-free transactions should be determined with respect to federal income tax law standards. If a transaction does not require current recognition of any gain or loss for purposes of determining tax liability, it should be exempt from the three year holding requirement without the Commission having specifically identified or listed what types of transactions are "tax-free" for this purpose. This broad conceptual approach would, of course, include all types of transactions that do not require current recognition of gain or loss (except to the limited extent of "boot" that does not undermine the primarily tax-free nature of the transaction).⁴⁸

⁴⁶See, e.g., Time Warner Comments at 18-20, 23-25; Sandler, et al, at 23; Industry Group Comments at 9-11; and NCTA Comments at 45.

⁴⁷See, e.g., Time Warner Comments at 27-28; TCI Comments at 51 and 54; and Liberty Media Comments at 46-47.

⁴⁸See, e.g., n.44, supra; Time Warner Comments at 20-23; and Liberty Media Comments at 45-47. In addition, certain comments identified types of tax-free transactions for which this exemption should be available in addition to those specifically
(continued...)

H. The Commission has broad waiver authority, which it should apply flexibly on a case-by-case basis.

The Commission's general authority to grant waivers of the three year holding requirement was expressly or implicitly recognized by virtually every party who commented on this issue, including certain regulators.⁴⁹ The only limitations are that the Commission act "in the public interest" and that the Commission not eliminate any need for local approval. Appropriate access to waivers for legitimate transactions requires that the Commission have a flexible case-by-case approach to waiver requests.⁵⁰ Contrary to suggestions that the public is best served and the Commission not unnecessarily burdened if the Commission is precluded from considering any waiver request until after any required local approval is received,⁵¹ waivers conditioned on subsequent receipt of any

⁴⁸(...continued)
referred to by Time Warner and other commenters seeking a broad scope for this exception. See, e.g., Sandler, et al, at 12-15; and Industry Group Comments at 12-14.

⁴⁹See, e.g., NJ Board Comments at 2; NY Commission Comments at ¶ 13; Time Warner Comments at 31-33; Liberty Media Comments at 49; TCI Comments at 54-56; Small Systems Group Comments (focus of comments is requests for blanket waivers); Sandler, et al, at 22; Intermedia Comments at 6-8; Industry Group Comments at 24-26; and NCTA Comments at 50-51.

⁵⁰See, e.g., Time Warner Comments at 31-33; Sandler, et al, at 22-23; and Industry Group Comments at 25-26.

⁵¹See, e.g., Local Governments Comments at 14; and NJ Board Comments at 3-4.

necessary local approval are permissible and beneficial.⁵²

Often, resolution of issues raised in a local approval process is the final legal obstacle to closing.⁵³ Uncertainty about receipt of a waiver and unnecessary delays in initiating a request may distract local decision-makers and inhibit efficient financing.⁵⁴

II. LIMITATION ON DURATION OF FRANCHISE AUTHORITY POWER TO DISAPPROVE A TRANSFER: The 120 day rule in Section 617(e).

A. The Commission must take authoritative action, or local authorities will be able to undermine the purpose of Section 617(e).

The Commission clearly needs, and Congress expected it,⁵⁵ to take authoritative steps in implementing the 120 day limitation on the duration of a franchise authority's right to disapprove franchise transfers or assignments. The comments from or on behalf of regulators indicate at least some reluctance, if not total refusal, to recognize that Congress has preemptively determined that 120 days is ample time for them to consider and act on such a request. Such comments suggest no meaningful or discernible limitation on information requests, and even assert that franchise authorities can and will decide if and when the

⁵²See, e.g., NY Commission Comments at ¶ 14; Time Warner Comments at 35-36; TCI Comments at 56; Sandler, et al, at 25; and NCTA Comments at 51.

⁵³See, e.g., Industry Group Comments at 27.

⁵⁴Id. at 27-28; and Liberty Media Comments at 41 (cites Transfer of Broadcast Facilities conclusion that even time required to obtain a waiver can deter investment).

⁵⁵See Time Warner Comments at 41-46, particularly at n.63 and related text.

120 days has started, when it is tolled and when, if ever, it has passed.⁵⁶ To allow a franchise authority unilaterally to determine and inform an applicant when it has submitted information sufficient to make its decision⁵⁷ is totally contrary to and would eviscerate Congress' intent to require action within a reasonable and consistent timeframe.⁵⁸

In its initial comments, Time Warner generally described the types of abuses and obstacles it has faced in the local franchise transfer approval process.⁵⁹ A few specific examples follow.

(1) The franchising authority misuses a request for approval as an opportunity to "re-interpret" the franchise agreement to extract new equipment, services.

(a) One community used the merger of Time Inc. and Warner Communications Inc. (the "Time Warner

⁵⁶See, e.g., Local Governments Comments at 3 (broad authority to seek any information it deems relevant, and to obtain all information required or that it deems necessary or appropriate), 6-7 (broad scope of relevant information, including operations and transferor's breaches of franchise, is crucial), 14-17 (Commission's guidelines will have no impact, because franchising authority permitted to seek exhaustive and detailed financial, structural and operational information subject only to a vague, locally determined reasonableness standard) and 18 (franchising authority will decide and tell operator when all requested information filed and 120 days begins); NJ Board Comments at 4 (120 days starts when all requested data filed, as determined by local standards with Commission guidelines only providing a minimum); and NY Commission Comments at ¶ 3 (seems to suggest 120 day rule only applies if three year holding requirement does not apply) and ¶ 15 (Commission standards only a minimum so no need for exhaustive list; 120 days starts when franchising authority satisfied with information provided).

⁵⁷See, e.g., Local Governments Comments at 18.

⁵⁸See, e.g., Time Warner Comments at 42-44; and Industry Group Comments at 21-22.

⁵⁹See Time Warner Comments at 44-45.